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No. 98-1716; 98-1718

In the
Supreme Court of the United States
October Term, 1998

PENNY KOTTERMAN, et al., Petitioners,
v.
MARK KILLIAN, et al., Respondents

LOUIS RHODES, Petitioner,
v.
MARK KILLIAN, Respondent

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF ARIZONA

MOTION AND BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS *AMICUS CURIAE*

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MOTION OF NATIONAL SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The National School Boards Association (NSBA) respectfully moves this Court to grant it leave to file the attached brief as *amicus curiae* in the above captioned case. Petitioners in *Kotterman v. Killian* (No. 98-1716) have consented to NSBA's

participation in this matter. A letter attesting to their consent has been submitted to this Court.

NSBA has a longstanding interest in educational policy and has been a frequent contributor of *amicus* briefs in this Court on many issues including: *Plyer v. Doe*, 457 U.S. 202 (1982) (equal protection – undocumented alien students); *Rowley v. Board of Education*, 510 U.S. 1202 (1982) (IDEA – educational methodology); *Washington v. Seattle Public Schools*, 458 U.S. 457 (1982) (equal protection – voluntary desegregation); *Board of Education of Paris v. Vail*, 466 U.S. 377 (1984) (procedural due process – "property" interest in continued employment); *Irving Independent School Dist. v. Tatro*, 469 U.S. 809 (1984) (IDEA – related services); *New Jersey v. T.L.O.*, 469 U.S. 325 (1984) (Fourth Amendment – student search and seizure); *Smith v. Robinson*, 464 U.S. 932 (1983) (IDEA – attorneys' fees); *Oklahoma v. Gay Task Force*, 470 U.S. 903 (1985) (teacher free speech – statute forbidding speech outside school on subject of gay rights); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532

(1985) (procedural due process – teacher's right to pre-termination hearing); *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986) (Civil Rights Act of 1964, Title VII – accommodation of teacher's religious beliefs); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (First Amendment student free speech); *Bowsher v. Synar*, 478 U.S. 714 (1986) (separation of powers – legislative veto); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986) (teacher free speech – damages); *Wygant v. Jackson Board of Education*, 478 U.S. 1014 (1986) (equal protection – layoffs on basis of race to promote "role models"); *School Board of Nassau County v. Arline*, 481 U.S. 1024 (1987) (Section 504 of the Rehabilitation Act of 1973 – teacher with infectious disease); *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (student free speech – school newspaper); *Honig v. Doe*, 484 U.S. 305 (1988) (IDEA – removal of violent disabled student); *DeShaney v. Winnebago Dept. of Social Services*, 489 U.S. 189 (1989) (substantive due process – duty to protect child from parents/guardians); *Board of Education of Westside*

Community Schools v. Mergens, 496 U.S. 226 (1990) (Equal Access Act – establishment of religion, meaning of "curriculum-related"); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (due process – punitive damages); *Lee v. Weisman*, 505 U.S. 577 (1992) (establishment of religion – clergy-led graduation prayer); *Florence County Dist. 4 v. Carter*, 510 U.S. 7 (1993) (IDEA – duty to pay tuition at uncertified private school); *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993) (establishment of religion, free speech – use of school facilities); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (establishment of religion – providing a sign language interpreter to child in religious school); *Grumet v. School Dist. of Kiryas Joel*, 512 U.S. 687 (1994) (establishment of religion – state formation of separate religious school district); *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995) (establishment of religion and free speech – funding of student religious newspaper); *United States v. Lopez*, 514 U.S. 549 (1995) (interstate commerce clause – limitation of congressional authority); *Vernonia School Dist. v.*

Acton, 515 U.S. 646 (1995) (student search and seizure); *Board of Education of Piscataway v. Taxman*, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 117 S.Ct. 2506, *writ dismissed*, 118 S.Ct. 595 (1997) (Title VII – layoffs on basis of race to promote "diversity"); *Gebser v. Lago Vista Independent School Dist.*, 118 S.Ct. 1989 (1998) (Title IX – standard of liability imposed on school district for teacher on student sexual harassment); *Cedar Rapids School District v. Garret F.*, 119 S. Ct. 992 (1999) (IDEA – scope of medical services exclusion); *Davis v. Monroe County Bd. of Educ.*, No. 97-843 (U.S. May 24, 1999) (Title IX – cause of action for peer sexual harassment).

Because this case has such direct bearing on how state legislatures will resolve this educational issue, NSBA respectfully requests the opportunity to advise this Court on this matter.

Respectfully submitted,

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BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

Petitioners in *Kotterman v. Killian* (No. 98-1716) have consented to the filing of this brief.[1] Their consent is on file with the Clerk.

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[1] This brief was written by National School Boards Association (NSBA) who is *amicus curiae* before this Court and not in any part by counsel for either party. No person or entity other than NSBA has made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS*

Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards across the United States and the school boards of the District of Columbia, Guam, Hawaii, and the U. S. Virgin Islands. NSBA represents the nation's 95,000 school board members. These board members govern more than 15,000 local school districts that serve more than 46.5 million public school students – approximately 90 percent of all elementary and secondary school students in the nation. NSBA has had a longstanding interest in the effective development and implementation of local school board policies, including those touching on the Establishment Clause.

STATEMENT OF THE CASE

We adopt the Statement of the Case as presented by Petitioners.

ISSUE PRESENTED FOR REVIEW

Does the Arizona tax credit violate the Establishment Clause of the First Amendment to the United States Constitution?

REASONS FOR GRANTING THE WRIT

I. This case raises Establishment Clause concerns of the first order requiring clear direction from this Court on the constitutional limitations on direct public funding of religious educational institutions.

The heart of the question is whether the Establishment Clause requires a subsidy to parents/guardians of children who attend religious schools. The Establishment Clause does not require a public subsidy for religious education – it prohibits it.

This Court has held that, "The clearest command of the Establishment Clause is that one religion cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Equally important, the Establishment Clause prohibits favoritism to any religion.

> Whatever else the Establishment Clause may mean (and we have held it to mean no official preference even for religion over nonreligion, see, e.g., *Texas*

> *Monthly, Inc. v. Bullock*, 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989)), it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions).

County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 603 (1989). *See also* D. Laycock, *Nonpreferential Aid to Religion - A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1991).

This Court, in previous cases has dealt with the issue of public funding of religious education. In these cases, this Court has held that the Establishment Clause does not allow direct public funding of religious education. *E.g.*, *PEARL v. Nyquist*, 413 U.S. 756, 788 - 89 (1973); *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975).

Neither is the state required to provide such equal expenditures on religious education as a part of a free exercise claim. In *Leutkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974), parents/guardians of parochial

school students challenged Missouri's refusal to provide them with free bus transportation while providing such transportation to public school students. Citing *Brusca v. State*, 332 F. Supp. 275, 279 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972), the three judge court rejected the claim. *Accord Witters v. Washington Dept. of Services for the Blind*, 112 Wa.2d 363, 771 P.2d 1119, *cert. denied*, 493 U.S. 850 (1989).

Recall Justice Souter's words in *Agostini v. Felton*, 521 U.S. 203 (1997), we tend

> to forget the hard lessons, and to overlook the history of governmental partnership with religion when ... bureaucrats have programs. That tendency to forget is the reason for having the Establishment Clause (along with the Constitution's other structural and libertarian guarantees), in the hope of stopping the corrosion before it starts.

521 U.S. at 244 (Souter, J. dissenting).

II. The Court's immediate guidance is imperative given the substantial state legislative activity involving public funding of private education.

The issue of public funding for private education is of increasing frequency in state legislatures. There is substantial state

activity in the form of tuition voucher and tax credits. Current proposals and actions are summarized below:

STATE	VOUCHER STATUS	PENDING LEGISLATION/CASES
AZ	State tax code allows residents to claim a tax credit of up to $500 for donations to charitable organizations that provide scholarships to students to attend private or religious schools (tax credit also applies to up to $200 of activity fees at public schools within the state).	Suit brought challenging tax credit law on Establishment Clause grounds. *Kotterman v. Killian*, No. C-B-970412-SA. Oral arguments presented to Arizona Supreme Court in December 1997. State supreme court decision on 1/27/99 upheld constitutionality of tax credit. Petition for *certiorari* was filed with U.S. Supreme Court on 4/26/99.
CO	No private school vouchers.	Class action suit brought in 1997 by parents claiming Denver school system has failed to teach poor and minority students basic skills. Plaintiffs are seeking tuition vouchers for use in either public or private schools as a remedy. Suit was dismissed and is being appealed to state court of appeals. Tuition tax credit program initiative on the 11/3/98 statewide ballot. Tax credit would be available to families who transfer children from a below-average public school to a private school. Program would be funded by the savings in tax dollars that result from students leaving the public school system for private schools. The initiative was rejected by voters 60% to 40% in the November elections.

STATE	VOUCHER STATUS	PENDING LEGISLATION/CASES
FL	Private school vouchers to be provided to students at the four lowest performing schools in the state.	Voucher bill passed in state house and senate 4/30/99.
IA	Parents of private school students who are not provided with state transportation are entitled to reimbursement for transportation costs via state's transportation voucher program (the program has survived several legal challenges). Parents of private school students are also entitled to take a tax deduction of up to $1,000 per child in school with a limit of four per family. In May 1998 governor signed tuition tax credit bill into law that increased the state's tax credit from $100 to $250 on the first $1,000 of tuition expenses. The law also expands the definition of allowable tuition and textbook expenses to include expenses related to extracurricular activities.	No pending legislation or cases.
ME	No private school vouchers for religious schools. State's 200 year old law provides students in rural areas lacking public schools with tuition vouchers for use in enrolling in either nonreligious private or public schools.	On April 23, 1999 the Maine Supreme Judicial Court in a 5 to 1 decision affirmed the lower court's holding that Maine's education tuition program, which excludes the use state funds for religious school tuition, does not violate the Free Exercise, Establishment or Equal Protection Clauses of either the U.S. or Maine Constitution.

STATE	VOUCHER STATUS	PENDING LEGISLATION/CASES
MA	No private school vouchers.	In 1998 parents of Catholic school students filed suit against the state in federal district court, challenging the state constitution's 1854 amendment prohibiting the use of public funds for religious schools as violating their free exercise of religion rights under the U.S. Constitution (*Boyette v. Galvin*, No. 98-10377, status: pretrial).
MN	Existing state tax code provision allowing families of public school students to take a tax deduction for school expenses, including required clothing, textbooks, and other supplies, was amended in 1997 to include families of private and religious school students. The amounts deductible were increased from $1,000 to $2,500 for 7-12 grades, and from $650 to $1,625 for K-6 grades. In addition, the definition of expenses was expanded to include summer school, camps, tutoring, p.c. hardware, and educational software. The amendment also provides families with incomes of $33,500 or less with a refundable education tax credit of $1,000 per child, limit of two per family (amended tax deduction amounts are effective as of 1998 state income tax returns).	No pending legislation or cases.

STATE	VOUCHER STATUS	PENDING LEGISLATION/CASES
MS	No private school vouchers.	Governor proposed ballot initiative called the People's Right to Initiate Model Education (PRIME) Act which would give citizens the right to propose changes in school management to local boards. If the change is rejected by the school board, it can be submitted directly to the voters. The proposal would allow local communities to adopt voucher programs. PRIME received the required number of petition signatures to appear on the 1998 state ballot but failed to pass.
MO	No private school vouchers.	In 1998 a bill was defeated in the state legislature which would have funded scholarships of $2,500 to $3,000 for students, whose families are 200% of the poverty line, for use at a school of choice or for tutoring expenses.
NH	No private school vouchers. However, under state law rural school districts are permitted to use local tax revenue to send students to nearby public or private schools.	In 1997 and 1998 bills proposed in state legislature to allow school districts to vote on reimbursing parents for public, private, or home schooling tuition costs were defeated.

STATE	VOUCHER STATUS	PENDING LEGISLATION/CASES
NY	No private school vouchers.	1998 bill, providing tax credit to persons donating money to private scholarship programs, failed in state legislature.
OH	In 1996 state began two year pilot voucher program for Cleveland. Ohio was the first state to enact a voucher program that includes religious schools. It provides scholarship funds up to $2,500; low income students are eligible for 90% of tuition costs, all others 75%. In 1998 the program was amended to require the Cleveland School District to provide scholarship program students with transportation.	In July 1996 the AFT filed suit challenging the constitutionality of the voucher program. Franklin County Court of Common Pleas ruled that the program did not violate either the U.S. or state constitution's establishment clause on the grounds that sectarian schools benefited only indirectly and as a result of parents' independent private choices. In May 1997 the Ohio Court of Appeals reversed (3-0), finding both the U.S. and state constitutions' establishment clause had been violated. The Ohio Supreme Court granted a stay, allowing the program to continue pending the outcome of the appeal. During the stay the program has been increased from 2,000 to 3,000 students. Oral arguments were heard on 9/28/98. Decision pending.

STATE	VOUCHER STATUS	PENDING LEGISLATION/CASES
PA	No private school vouchers.	Southeast Delaware County School Board implemented a private school voucher program, including religious schools, available to any school district student. A coalition, lead by the PSEA, filed suit against the school district. The PSEA challenged the program's constitutionality. The court granted the PSEA's motion for judgment, ordering the school district to scrap its voucher plan. However, the court did not address the issue of the plan's constitutionality, instead holding that the school board did not have the authority to spend state taxpayer money on private schools.

STATE	VOUCHER STATUS	PENDING LEGISLATION/CASES
TX	Houston School District implemented voucher program in response to school overcrowding and local taxpayers' rejection of bond measures at the polls. The plan allows students from overcrowded schools to attend area private schools at the school district's expense. In 1998 it amended the plan to allow academically failing students at low performing schools to enroll in approved private, nonreligious, schools.	
VT	Under state law, students in towns without public schools may attend public or approved private schools at state expense. A 1961 state supreme court ruling prohibits students from attending religious schools.	In 1996 the town of Chittenden filed suit to ensure state funds would continue to be available to send its high school students to schools outside the community, after the state refused to allocate the funds to the town because some students stated their intention to attend religious schools. In 1997 the Rutland County Superior Court denied the town's request for state funds for religious school tuition. The case was appealed to the state supreme court which heard oral arguments on 3/10/98. Decision pending.

STATE	VOUCHER STATUS	PENDING LEGISLATION/CASES
WI	Milwaukee Parental Choice Program (MPCP) provides vouchers to parents of low income students in the Milwaukee school system to be used for private school tuition, including religious schools. The program has survived two court challenges to its constitutionality in the state courts, the last coming after it was amended to include religious schools.	In 1998 the state supreme court ruled in *Jackson v. Benson* that the MPCP did not violate the First Amendment Establishment Clause because the benefit to religious schools is indirect and results from independent choices made by participating parents. A coalition lead by the WEA filed a petition of *certiorari* with the U.S. Supreme Court on 8/31/98. The petition for *certiorari* was denied on 11/9/98.

CONCLUSION

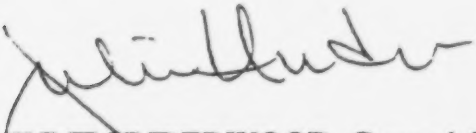
When religious schools arose, they were dedicated to a mission to inculcate and proselytize in addition to teaching important educational lessons of the day. It remains that way. It has been an impenetrable and important wall that has kept public money from flowing to religious schools.

Those with a religious agenda must pay the freight for animating their belief in private and parochial schools – and cannot advance their private faith on the public treasury. This Arizona tax credit is a wink and a nod to the very clear and explicit prohibition against religious school financial support. This is a transparent shell game that seeks to misdirect the scrutinizing gaze. The Establishment Clause will not tolerate or accommodate such subterfuge.

This plan and others like it cropping up around the country, violate the bedrock principles of the First Amendment. Taking this case and reversing the course of events gaining headway in

legislatures coast-to-coast, would bring clarity and reaffirm the concept that public money belongs to truly public schools.

Respectfully submitted,



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